*** THE HONOURABLE SRI JUSTICE GODA RAGHURAM**

+ WRIT PETITION NO. 18611 of 2007

% 5th DAY OF SEPTEMBER, TWO THOUSAND SEVEN

B. Uma Devi

… Petitioner

versus

$ The Greater Hyderabad Municipal Corporation, represented by its Commissioner, Tankbund, Hyderabad and another

… Respondents

! Counsel for the petitioner : Mr. D. Madhava Rao

^ Counsel for the respondents : P. Radha Krishna, SC for GHMC

< Gist :

>Head Note:

? 1. AIR 1995 AP 17
2. AIR 1991 SC 1453
3. 2006 AIR SCW 5192
4. 1995 SUPP (4) SCC 426
5. (2004) 8 SCC 733
6. (2005) 4 SCC 99
7. (1999) 6 SCC 464
8. (2000) 7 SCC 425

HON'BLE SRI JUSTICE GODA RAGHURAM

W.P.NO. 18611 of 2007

DATED: 5.9.2007

Between:

B. Uma Devi

… Petitioner

and

The Greater Hyderabad Municipal
Corporation, represented by its
Commissioner and another

…
Respondents

HON'BLE SRI JUSTICE GODA RAGHURAM

W.P.NO. 18611 OF 2007

ORAL ORDER:

The petitioner assails the notice dated 6.8.2007 [issued under Section 636 of the Hyderabad Municipal Corporation Act, 1955 (for short 'the Act'], whereby the petitioner is directed to demolish/pull down/remove the deviations/unauthorized structure, specified therein.

Earlier on 16.7.2007, the 1st respondent issued a notice under Section 452 of the Act, intimating the petitioner that having obtained a building permission for construction of a residential, ground+two floors structure, vide a permit dated 22.5.2003, she had deviated from the approved plan in the constructions. The deviations (pointed out in the notice) are; an extent 1.51 mts in the front set backs and 0.50 mts on the set back on one side, apart from addition of a room unauthorisedly, on the 3rd floor. The petitioner was called upon to submit her explanation to the show cause notice within the stipulated time. On 3.8.2007, the petitioner submitted her explanation stating that she had not violated any

law; her house is an individual house and not an apartment or a flat complex; and that she has maintained the set backs, except for some minor deviations. Having considered the explanation, the 1st respondent issued the impugned notice, calling upon the petitioner to remove or demolish the deviations within 3 days, failing which the respondent would initiate action as per the provisions of the Act, and would demolish the same at the petitioner's cost.

Sri D. Madhava Rao, the learned counsel for the petitioner, would contend that in the context of either failing to act or negligently permitting large scale deviant constructions of a graver magnitude, including by multi-storied builders, the 1st respondent Corporation is not authorized to proceed against the petitioner's deviations. It is alternatively contended that as the deviations by the petitioner are minor/trivial, demolition ought not be have been resorted to.

Another contention urged is that the respondent instead of resorting to demolition of the deviant constructions, ought to have compounded the same. As there is no public nuisance caused by the minor deviations by the petitioner and as there are no complaints by the neighbours as to the petitioner's deviant constructions, the respondent acted unlawfully, in exercising powers under Section 636 of the Act, is also a contention.

Despite initially responding to the notice under Section 452

of the Act asserting that she had not violated the law (a vague response), the learned counsel for the petitioner now concedes that the deviations, asserted in the notice under Section 452 of the Act and the impugned notice under Section 636 of the Act, are true. There is, therefore, a recantation from the earlier stance by the petitioner and an admission as to the deviations. The wholesale denial of the factual position, in the earlier response of the petitioner (to the notice under Section 452) requires to be deprecated. There is now an admission of the violations as alleged by the 1st respondent. There is also no pleading in the writ petition that the nature and extent of deviations as specified in the Sec.4252 notice or the impugned notice, are incorrect.

According to the sanctioned plan, the petitioner was required to leave a front open space of 3.00 mts, but has left only 1.49 mts, a deviation of 1.51 mts, which is unauthorized encroachment of more than 50% of the front open space required to be left un-constructed. In respect of one side open space, while the sanctioned plan ordained a side open space of 1.5 mts, the petitioner left a mere 1.00 mt, thereby deviating to the extent of 0.50 mts, a 33 1/3 % deviation from the sanctioned plan. The petitioner has also constructed a room in the 3rd floor without any permission. These are characterized by the petitioner to be minor/trivial deviations.

The petitioner relies on a judgment of a Full Bench of this court in ***3 ACES V. MUNICIPAL CORPORATION OF HYDERABAD*** ([1]). A number of issues under the provisions of the Act fell for the consideration of the Full bench in that case, including as to the entitlement of a person to construct in the factual context of a deemed permission consequent on the silence of the Municipal Corporation in responding to an application for building permission within the stipulated time. This court pointed out in the judgment that a deemed permission is not a licence to vagrant and malignant construction. Deemed permission would enable construction in accordance with the extant building regulations, pointed out this court.

This court also considered the contention on behalf of the petitioner therein, that the enabling power conferred on the Commissioner under Section 452 of the Act is not mandatory but discretionary. Relying on well-settled principles of statutory construction that public power is a power coupled with a duty and that such power is conferred on a public authority to be exercised when circumstances warrant exercise of powers in public interest, this court held that the word 'may' in Section 452 of the Act is a mandatory command.

The Full Bench also referred to the judgment of the Supreme Court in ***PRATIBHA CO-OPERATIVE HOUSING SOCIETY LTD V. STATE OF MAHARASHTRA*** ([2]), where the Supreme Court

expressed grave concern at the alarming increase in the magnitude of unlawful constructions and unauthorized encroachments all over the country and pointed out that such delinquency must be dealt with firmly.

After noticing the observations of the Supreme Court above, the Full bench spelt out guidelines to be followed by the Commissioner in respect of illegal constructions (Para 36 of the AIR report). The Full Bench clearly pointed out that these guidelines should not be treated as exhaustive but merely illustrative and that discretion must be exercised by the Corporation in any given case, but not arbitrarily or capriciously.

Among the guidelines formulated by the court for contouring the discretion of the Commissioner under Section 452 or 636 of the Act, is one that points out that where applications for building permission have been duly filed, the power of demolition should be exercised only if the deviations made during the construction are not in the public interest or cause public nuisance or are hazardous or dangerous to public safety including the residents therein. If the deviations or violations are however minor, minimal or trivial and do not affect the public at large, the Corporation should not resort to demolition.

As pointed out by the learned Full Bench itself, these guidelines issued by the court do not supplant the law nor do they constrain by judicial fiat the spectrum of discretion granted (by the

provision of the Act) to the Commissioner to rationally act in accordance with the power conferred under Sections 452 and 636 of the Act. Being a statutory power, the power under sections 452 and 636 is one complied with an obligation.

Having regard to the rampant attitude of defiance of the law and in particular the laws relating to constructions of buildings in accordance with the building Regulations and permissions, for wholly ingenuous and artificial reasons propounded on a regular basis, the building laws are seen to have become prey to executive indifference and an epidemic and pathological level of public defiance. The scale and magnitude of violations of building Regulations with undisguised impunity and alarming regularity, undermines the Sovereign will of the Nation, as by law spelt out. The apathy of the executive agencies of the State, either on account of conscious misdirection or structural inadequacy (to execute the law) has given rise to a situation where building Regulations are almost never followed. There is a dyslexia between the legislative command and its enforcement.

Violations of the terms and conditions in a sanctioned building permit and deviations in construction must be considered in the above holistic context and in a social context where deviance has become an epidemic.

In case on hand, the front side open space usurpations by the petitioner are in excess of 50% and on one side, 33 and 1/3rd

percent. In case of a fire hazard, it is impossible to manoeuver even a mobile fire fighting equipment through a 1 metre passage on that side. The reasons for the violation are not forthcoming.

In the considered view of this court, such unexplained deviation from the sanctioned plan cannot be considered a casual transgression. It is a conscious and willful defiance of the law. What were the compulsions which disabled the petitioner from complying with the terms of the sanctioned permit, are not explained.

The characterization of a violation as minor/trivial or otherwise cannot depend solely on the physical extent of the violation. The magnitude of a violation must be judged in the context of and in relation to the specific locality, the area of the plot, the nature of the building, the reasons if any for the deviation, the impact of the deviation on the habitat, as also the contribution of this deviance to orderly society. It is also legitimate for the Commissioner to consider whether rampant deviant constructions even without a fig leaf of a justification undermine the rule of law, the authority of an instrumentality of the State and stultify the efficacy and operational vitality of executive agencies to implement urban planning and construction standards as by law and statutory instruments enjoined.

As pointed out in ***MUNI SUVRAT SWAMI JAIN SMP SANGH V. ARUN NATHURAM GAIKWAD*** ([3]), where the Act

has conferred a discretion on the respondent to proceed towards demolition of an unauthorized construction, the law presumes until the contrary is established by the petitioner that the discretion was properly exercised and within the spectrum of discretion.

Except asserting that the deviations in the petitioner's building are minor or trivial, and which on analysis are seen to be not, the petitioner does not either plead or establish that the decision in the impugned notice constitutes an abuse of discretion by the 1st respondent.

The learned counsel for the petitioner would also contend that in another W.P.No.17542 of 2006, the Dy. Commissioner, who had filed a counter affidavit, has characterized the violations in the petitioner's premises as minor. That was a physical description of the violations and in relation to violations of greater magnitude in the locality.

In the case on hand as in all cases of unauthorized and deviant constructions, one of the relevant factors is; what is the extent of deviation in relation to the open spaces mandated by the relevant Regulations? Building Regulations are enacted not to create a regulatory environment for the Commissioner to operate and for no ostensible public purpose, but to maintain ecological and habitat norms in a locality.

According to the applicable Building Regulations, the petitioner was required to leave an open space of 3 mts on the

front and 1.51 mts on either side. But she had encroached 50% of the front open space and 33 and 1/3rd percent of the side open space. Whether the deviations are minor or otherwise is to be considered in this relative context, not in the context of whether 1.5 mts or 0.5 mts of constructions constitute minor or major deviations. It is in relation to the adverse impact on the regulations, which mandate the open spaces standards for air and ventilation and the pejorative degree of the impact, on account of the deviations. Building Regulations are expressions of a society's habitat standards. They are not mere house-keeping provisions.

The other contention urged by the learned counsel for the petitioner is that since it is an individual building and not an apartment complex, the deviations are not serious. This is a contention that is stated to be rejected. Nothing more need be stated on this aspect.

Apart from the decision of the Full Bench of this Court in ***3 ACES V. MUNICIPAL CORPORATION OF HYDERABAD*** *and* ***PRATIBHA CO-OPERATIVE HOUSING SOCIETY LTD V. STATE OF MAHARASHTRA(1st and 2nd supra),*** the broad principles with regard to the power of the local authorities to deal with unauthorized or deviant constructions as spelt out in other binding precedents, may be noticed. In **Syed Muzaffar Ali and others Vs. Municipal Corporation of Delhi([4])** the Supreme Court

rejected a challenge to an order of demolition and held that since the structural changes brought about by the petitioner amounted to constructions unauthorizedly made, no relief could be granted. While stating that the mere departure from an authorized plan or putting up of a construction without sanction may not *ipso facto* and without more necessarily and inevitably justify demolition of the structure and some of these may be amenable to compounding while others may not, held that it is for the authorities to consider at the appropriate time and having regard to the nature of the construction. The Supreme Court pointed out that if regularization of the unauthorized constructions is permissible, the petitioners are at liberty to seek such regularization.

In the case on hand the petitioner has failed to show any power in the respondents to regularize the deviant constructions made by her nor is there any plea that she has applied for regularization of the unauthorized constructions to any competent authority.

In **Friends Colony Development Committee Vs. State of Orissa and others ([5]) (Per R.C.Lahoti, C.J),** the Supreme Court made an empirical and normative analysis as to the obligation of a person or a builder to comply with the zoning and planning regulations and the obligation of the local authority to effectuate such regulations in the general public interest. The observations of the Supreme Court in this regard may usefully be

extracted:

> 20. The pleadings, documents and other material brought on record disclose a very sorry and sordid State of affairs prevailing in the matter of illegal and unauthorized constructions in the city of Cuttack. Builders violate with impunity the sanctioned building plans and indulge in deviations much to the prejudice of the planned development of the city and at the peril of the occupants of the premises constructed or of the inhabitants of the city at large. Serious threat is posed to ecology and environment and, at the same time, the infrastructure consisting of water supply, sewerage and traffic movement facilities suffers unbearable burden and is often thrown out of gear. Unwary purchasers fin search of roof over their heads and purchasing flats/apartments from builders, find themselves having fallen prey and become victims to the designs of unscrupulous builders. The builder conveniently walks away having pocketed the money leaving behind the unfortunate occupants to face the music in the event of unauthorized constructions being detected or exposed and threatened with demolition. Though the local authorities have the staff consisting of engineers and inspectors whose duty is to keep a watch on building activities and to promptly stop the illegal constructions coming up, they often fall in discharging their duty. Either they don't act or do not act promptly or do connive at such activities apparently for illegitimate considerations. If such activities are to stop some stringent actions are required to be taken by ruthlessly demolishing the illegal constructions and non-compoundable deviations. The unwary purchasers who shall be the sufferers must be adequately compensated by the builder. The arms of the law must stretch to catch hold of such unscrupulous builders. At the same time, in order to secure vigilant performance of duties, responsibility should be fixed on the officials whose duty it was to prevent unauthorized constructions, but who failed in doing so either by negligence or by connivance.
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> 21. The Conduct of the builder in the present case deserves to be noticed. He knew it fully well what was the permissible construction as per the sanctioned building plans and yet he not only constructed additional built-up

area on each floor but also added an additional fifth floor on the building, and such a floor was totally unauthorized. In spite of the disputes and litigation pending he parted with his interest in the property and inducted occupants on all the floors, including the additional one. Probably he was under the impression that he would be able to either escape the clutches of the law or twist the arm of the law by some manipulation. This impression must prove to be wrong.

22. In all developed and developing countries there is emphasis on planned development of cities which is sought to be achieved by zoning, planning and regulating building construction activity. Such planning, though highly complex, is a matter based on scientific research, study and experience leading to rationalization of laws by way of legislative enactments and rules and regulations framed there under. Zoning and planning do result in hardship to individual property owners as their freedom to use their property in the way they like, is subjected to regulation and control. The private owners are to some extent prevented from making the most profitable use of their property. But for this reason alone the controlling regulations cannot be termed as arbitrary or unreasonable. The private interest stands subordinated to the public good. It can be stated in a way that power to plan development of city and to regulate the building activity therein flows from the police power of the State. The exercise of such governmental power is justified on account of it being reasonably necessary for the public health, safety, morals or general welfare and ecological considerations; though an unnecessary or unreasonable intermeddling with the private ownership of the property may not be justified.

23. The municipal laws regulating the building construction activity may provide for regulations as to floor area, the number of floors, the extent of height rise and the nature of use to which a built-up property may be subjected in any particular area. The individuals as property owners have to pay some price for securing peace, good order, dignity, protection and comfort and safety of the community. Not only filth, stench and unhealthy places have to be eliminated, but the layout helps in achieving family values, youth values, seclusion and clean air to make the locality a

better place to live. Building regulations also help in reduction or elimination of fire hazards, the avoidance of traffic dangers and the lessening of prevention of traffic congestion in the streets and roads. Zoning and building regulations are also legitimized from the point of view of the control of community development, the prevention of overcrowding of land, the furnishing of recreational facilities like parks and playgrounds and the availability of adequate water, sewerage and other governmental or utility services.

24. Structural and lot area regulations authorize the municipal authorities to regulate and restrict the height, number of storeys and other structures; the percentage of a plot that may be occupied; the size of yards, courts and open spaces; the density of population; and the location and use of buildings and structures. All these have in our view and do achieve the larger purpose of the public health, safety or general welfare. So are front setback provisions, average alignments and structural alterations. Any violation of zoning and regulation laws takes the toll in terms of public welfare and convenience being sacrificed apart from the risk, inconvenience and hardship, which is posed to the occupants of the building. (For a detailed discussion reference may be had to the chapter on “Zoning and Planning” in American Jurisprudence, 2d, Vol.82).

25. Though the municipal laws permit deviations from sanctioned constructions being regularized by compounding but that is by way of exception. Unfortunately, the exception, with the lapse of time and frequent exercise of the discretionary power conferred by such exception, has become the rule. Only such deviations deserve to be condoned as are *bona fide* or are attributable to some misunderstanding or are such deviations as where the benefit gained by demolition would be far less than the disadvantage suffered. Other than these, deliberate deviations do not deserve to be condoned and compounded. Compounding of deviations ought to be kept at a bare minimum. The cases of professional builders stand on a different footing from an individual constructing his own building. A professional builder is supposed to understand the laws better and deviations by such builders can safely be assumed to be deliberate and done with the intention of earning profits and hence deserve to be dealt

with sternly so as to act as a deterrent for future. It is common knowledge that the builders enter into underhand dealings. Be that as it may, the State Governments should think of levying heavy penalties on such builders and there4from develop a welfare fund which can be utilized for compensating and rehabilitating such innocent or unwary buyers who are displaced on account of demolition of illegal constructions.

26. The applicant for compounding the deviations made by the builders should always be dealt with at a higher level by a multi-membered High Powered Committee so that the builders cannot manipulate. The officials who have connived at unauthorized or illegal constructions should not be spared. In developing cities the strength of staff which is supposed to keep a watch on building activities should be suitably increased in the interest of constant and vigilant watch on illegal or unauthorized constructions."

In **Mahendra Baburao Mahadik and Others Vs. Subhash Krishna Kanitkar and others([6])** the appellant obtained a permission from the concerned municipality for effecting repairs on the ground floor and two upper floors but proceeded with construction of ground + six(6) floors. A resident of the locality(respondent) sought relevant particulars from the municipality as to the nature of the construction by the appellant but was denied access. He thereupon filed a writ petition in public interest before the High Court. While the appellant-builder failed to file a response in the High Court, on behalf of the municipal council a counter-affidavit was filed stating that in respect of the property a civil suit was pending where the builder had obtained an order of *status quo* and that an F.IR was also lodged under the relevant planning Act accusing the appellant and certain officers of

the municipal council of unlawful and criminal conduct. Before the High Court it was also urged on behalf of the municipality that the municipal council had resolved to regularize all unauthorized constructions by imposing a penalty and compounding of the offences. The State Government however contended before the High Court that it was not inclined to approve such a resolution of the municipal council. The High Court allowed the public interest litigation, quashed the municipal council's resolution for regularization of all unauthorized constructions, declared that offences relating to unauthorized or illegal constructions cannot be compounded and also declared that such constructions/structures will have to be demolished. Affirming the judgment and decision of the High Court the Supreme Court dismissed the appeal and directed the municipal council to execute and carryout the order of the High Court. Costs of Rs.50,000/- were also imposed on the appellant.

In **M.I. Builders (P) Ltd., Vs. Radhey Shyam Sahu([7])** the Supreme Court held that no consideration should be shown to the builder or any other person where a construction is unauthorized and that this is principle almost bordering on a rule of law. The Court also held that unauthorized constructions, if illegal cannot be compounded but have to be demolished; there was no way out; Judicial discretion cannot be guided by expediency; Courts are not free from statutory fetters; Justice is to be rendered in accordance

with law; and Judges are not entitled to exercise discretion for passing orders based solely on their personal predilections and peculiar dispositions pointed out the Supreme Court.

In **Consumer Action Group Vs. State of Tamil Nadu([8])** normative principles that should guide the exercise of power even by the State Government to grant exemptions was spelt out in the following words::

> " While exercising such a power the authority has to keep in mind the purpose and the policy of the Act and while granting relief has to equate the resultant effect of such a grant on both viz. the public and the individual. So long as it does not materially affect the public cause, the grant would be to eliminate individual hardship, which would be within the permissible limit of the exercise of power. But where it erodes the public safety, public convenience, public health etc. the exercise of power could not be for the furtherance of the purpose of the Act. Minor abrasion here and there to eliminate greater hardship, may in a given case, be justified but in no case affecting the public at large. So every time the Government exercises its power it has to examine and balance this before minor abrasion here and there to eliminate greater hardship, may in a given case, be justified but in no case affecting the public at large. So every time the Government exercises its power it has to examine and balance this before exercising such a power. Even otherwise, every individual right including fundamental right is within reasonable limit but if it makes inroads into public rights leading to public inconveniences it has to be curtailed to that extent. So no exemption should be granted affecting the public at large. Various development rules and restrictions under it are made to ward off possible public inconvenience and safety. Thus, whenever any power is to be exercised, the Government must keep in mind, whether such a grant would recoil on the public or not and to what extent. If it does then exemption is to be refused. If the effect is marginal compared to the hardship of an individual

that may be considered for granting."

On application of the afore noted binding rationes, the petitioner is seen to have failed to make out a case of arbitrary and incompetent exercise of discretion by the 1st respondent in issuing the impugned notice dated 6.8.2007, under Section 636 of the Act. The impugned notice is impeccable and suffers from no infirmities, warranting interference.

There are no merits. The writ petition is dismissed. The petitioner is always at liberty to parley with the respondent and the respondent to act in accordance with law. No costs.

- **GODA RAGHURAM, J**

Date: 5.9.2007

Note: CC in two days.

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Bo CVM/TSNR

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[1]. AIR 1995 A.P. 17

[2]. AIR 1991 SC 1453

[3]. 2006 AIR SCW 5192

[4] 1995 Supp(4) Supreme Court Cases 426

[5] (2004) 8 Supreme Court Cases 733

[6] (2005) 4 Supreme Court Cases 99

[7] (1999) 6 SCC 464

[8] (2000) 7 SCC 425